

Opinion No. 17-1985

April 28, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. W. G. Sargent, State Auditor, Santa Fe, New Mexico.

Permanent Funds Not To Be Expended. (See Opinion 2021.)

OPINION

I am in receipt of your letter enclosing requisition from Elephant Butte Water Users' Association for a warrant to be drawn upon the State Treasurer upon funds to the credit of Permanent Reservoirs for Irrigation Purposes and Improvement of Rio Grande, and asking advice as to whether or not such warrant should be drawn.

The moneys in the State Treasury to the credit of these two funds are derived from the sale and rental of lands granted by Act of Congress approved June 21, 1898. (30 Stat. Large 485.) Chapter 57, Laws of 1905, in substance, makes provision for the use of moneys derived from these two funds by the Elephant Butte Water Users' Association.

Chapter 115, Laws of 1917, is entitled "An Act to Provide for the Care, Disposition and Investment of the Revenues Derived from State Lands." Among other funds it creates:

"Permanent Reservoirs for Irrigation Purposes, Income Fund;"

Permanent Reservoirs for Irrigation Purposes, Permanent Fund;"

"Improvement of Rio Grande, Income Fund;"

"Improvement of Rio Grande, Permanent Fund."

It may be seen that two funds are created, growing out of each of the original funds -- one being an income fund, and the other a permanent fund. Section 3 of the Act enumerates a number of permanent funds, and provides that the same shall be "invested in safe interest-bearing securities, and which said funds shall forever be kept intact and inviolable." The two funds under consideration, however, are not enumerated in this section and are not governed by such provision. However, they are enumerated in Section 7 of the Act, which provides that the State Treasurer, subject to the approval of the Governor and Secretary of State, as in this Act provided, shall have control and direction of the investment of said funds, and further provides that "such funds shall be used as directed by the terms and conditions of the grants, or as directed by the legislature of the State of New Mexico; but, as far as possible shall be invested in the securities named in Section 4 of this Act, or may be, if deemed advisable, deposited in

any State or National Bank or Banks upon such terms and conditions as may be approved by the Governor and Secretary of State."

It may be seen that the same restrictions are not imposed as to the use of money derived from these two funds as are imposed with reference to the funds enumerated in Section 3, such as "Common School Permanent Fund," and "University Permanent Fund," and funds belonging to the other institutions of the State. I fail to find that the legislature of the State of New Mexico has made any direction as to the use of these funds, but the legislature of the Territory of New Mexico evidently directed the use of moneys derived from these funds by Chapter 57, Laws of 1905. This Act is not embraced in the Codification of 1915. Notwithstanding this, I am of the opinion that the same is in full force and effect.

But the Act of 1917 goes further than saying that such funds shall be used as directed by the legislature of the State of New Mexico, and says the same shall be used "as directed by the terms and conditions of the grants." The original grant did not make any specific directions as to the use of these funds. The Enabling Act granted lands to the State for the use of its various institutions, and, in Section 10 of said Enabling Act, appears the following provision:

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as defined by this act and the laws of the state not in conflict herewith."

The funds under consideration are not mentioned in the Enabling Act, but we find the following language in Section 12 of the Enabling Act:

"That all grants of lands heretofore made by any act of congress to said territory, except to the extent modified or repealed by this act, are hereby ratified and confirmed to said state, subject to the provisions of this act."

The grants of lands from which these funds are derived were heretofore made by an Act of Congress, and, in my opinion, are made subject to the provisions of this act. A very serious question, and one difficult of solution, is presented as to the construction of the Enabling Act with reference to the disposition and use of the funds under discussion, as well as all of the other permanent funds of the various State institutions, derived from the sale of public lands. This question is presented to the Supreme Court in a case now

pending before that court, and, pending a decision of the Supreme Court, I advise you to refuse to draw warrants upon these permanent funds, as well as the other permanent funds of the various institutions of the State, derived from the sale of land granted by the United States Government.

Again referring to Chapter 115, Laws 1917, as I have stated, the same restrictions are not imposed as to the use of these two funds as those of some of the other State Institutions. By careful reading of all of Section 7, it might be inferred that the legislature intended that these funds should "be invested in the securities mentioned in Section 4 of this Act," or, if deemed advisable, "deposited in any State or National Bank of Banks upon such terms and conditions as may be approved by the Governor and Secretary of State."

Hence, you have two reasons for refusing to draw these warrants. One is because of the provisions of the Enabling Act, and the other is the act of the legislature of 1917. Both of which furnish splendid reasons for waiting until the Supreme Court expresses its views upon this subject in the case now pending before it.